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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 356

ANTHONY PROVENZANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Honorable Justices of the United States Supreme Court:

The petition of Anthony Provenzano prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on June 20, 1967 (Appendix A), which affirmed the order of the District Court filed May 5, 1966, denying defendant's motion for a new trial and a collateral motion seeking relief from local Rule 23 (now Rule 19G). Oral opinions given by the United States District Court have not been reported and are printed *infra*. A *per curiam* opinion was filed by the United States Court of Appeals for the Third Circuit, as yet unreported, and is printed *infra* as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 20, 1967, and there have been no orders entered respecting a re-hearing or the granting of an extension of time within which to petition for *certiorari*. The jurisdiction of this Court is invoked under 28 U. S. C., section 1254.

Questions Presented

Was the defendant in a criminal trial to a sequestered jury denied a fair trial when members of that jury, immediately before taking the final ballot to convict, discussed the murder of a bitter foe of the defendant, despite the fact that they had been sequestered after the commencement of trial to prevent this news from reaching them?

When one juror testifies that just before the taking of the final ballot to convict the defendant he and another juror discussed the murder of a foe of the defendant, linking said defendant to the murder, should not the District Court be directed, under the supervisory powers of the Supreme Court, to examine the remaining jurors to make certain that the defendant received a fair trial?

When one juror testifies that another juror informed him that her husband had been put out of business by the defendant and that this fact was not revealed under the *voir dire*, should not the District Court be directed, under the supervisory powers of the Supreme Court, to examine that juror to see if the defendant received a fair trial?

Can a trial court limit or deny to a defendant the use of constitutional compulsory process for obtaining witnesses?

Can a trial court enjoin defendant and his counsel from subpoenaing or questioning any of the remaining eleven jurors after one juror has testified to an irregularity?

Can a trial court control and limit a defendant in his search for proof to present on a motion for a new trial?

Constitutional Provisions Involved

The compulsory process clause of the Sixth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment in regards to the proper standards for enforcement of the criminal law in the Federal courts.

Statutes and Rules Involved

The petitioner herein was indicted, tried and convicted under the provisions of 18 U. S. C., section 1951. The present application before the Court involves an application for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, based on the grounds of newly discovered evidence consisting of jury irregularities.

In addition to the Rule 33 motion, a collateral motion was filed seeking relief from local Rule 23 (now Rule 19G) of the Rules for the United States District Court for the District of New Jersey in order to place before the Court on the motion the testimony of jurors in support of the Rule 33 motion for a new trial.

Local Rule 19G reads as follows:

> "No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown."

The pertinent part of Rule 33 of the Federal Rules of Criminal Procedure reads as follows:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case."

Statement of the Case

On or about May 23, 1963, the petitioner herein went on trial in the United District Court for the District of New Jersey before a petit jury on the charge that he violated section 1951 of Title 18 (the so-called Hobbs Act.) A conviction was had and subsequent appeals to the Third Circuit and to the United States Supreme Court resulted in affirmance. A prior application for a new trial based upon a jury irregularity was denied, and subsequent appeals to the Third Circuit and to the United States Supreme Court resulted in an affirmance of that denial.

The present application results from the filing of a motion within time for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, based on the grounds of newly discovered evidence consisting of jury irregularities.

Because of the existence of local Rule 23 (now 19G), it became necessary for the attorney for the defendant to make an application to the court for the right to examine the jurors in order to present that evidence on the motion for the new trial.

One of the jury irregularities complained of had been related by one Henry Hurwitz to several witnesses who

testified, in support of the application, that Hurwitz stated that the jury had evidence before it of a murder, connecting it with defendant. The court refused to permit any of the jurors to be examined and refused to permit the attorney for the defendant to subpoena any of the jurors (see A288a-1 to 20).* In a lengthy oral opinion, which is printed *infra,* the court described the incident as incredible (Appendix C, *infra*). That order was entered on May 5, 1966.

However "incredible" the court might have concluded the testimony of the witnesses to be, its opinion paled into insignificance when on June 30, 1966, the juror Hurwitz actually delivered a letter to the Civil Liberties Union which ultimately reached the hands of the attorney for the defendant and was immediately presented to the trial court as a basis for a motion to reconsider its previous denial. A copy of the letter of June 30th is printed *infra* (Appendix E).

The trial court at this time, on its own motion, called in the juror and examined him in part, but would not permit counsel for the defendant to examine him except through the arm of the court, and refused further to permit an examination of any of the other members of the jury to see if what the juror Hurwitz said was in fact the truth. At that hearing the juror appeared voluntarily, with his own attorney in response to the court's questions, (see 258a and 259a),** and testified as follows:

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* All references commencing with "A" refer to Appendix on file with this Petition.

** All references to Appendix filed by the U. S. Attorney on this Petition is designated as Appendix for Appellee. In the latter Appendix, the pages are erroneously designated with letter "a" instead of "b". The pages 258A and 259A are taken from said Appendix for Appellee (U. S. Attorney's Appendix in this case). All other page references in said Appellee's Appendix are erroneously designated as "a" instead of "b".

"A. In substance that I was prejudiced and the fact regarding the handling of the check and that one of the other jurors had mentioned before the conclusion of the last day, mentioned that she was told about the murder in Hoboken of Mr. Glockner and—

"Q. Stop right there for a moment. You said that she mentioned this prior to the last day of the trial?

"A. The last day of the trial, almost at the conclusion of the last roll call.

"Q. What do you mean at the conclusion of your roll call, what roll call?

"A. Regarding the verdict.

"Q. Do you mean the roll call that you sat in that jury box?

"A. No, in the jury room." (275a).**

* * *

"Q. Did she tell you that this murder was in any way associated with Mr. Provenzano?

"A. She didn't directly say it, but the way she spoke to me, she was convinced that it was a contributing factor." (310a).**

He further testified at p. 322a:**

"Q. Is there anything you want to add to anything you said here today?

"A. Just that this same juror had acquainted me with the fact that her husband was once in the trucking business, and that through some kind of agreement which Mr. Provenzano renegotiated on her husband was forced out of business."

The court in its findings of fact supplementing those stated in the oral opinion, found that these were ultimate facts (see 353a-14 to 25; Appendix D, 24a).

Despite this, the court again denied a reconsideration and the appeal proceeded in the Third Circuit, resulting in the order from which relief is herein sought.

Facts Material to the Questions Presented

On the second day of original trial in this matter, the Assistant United States Attorney in charge of the prosecution of the case against the defendant said:***

> "I think in view of those facts that if the defendant is to be given a fair trial that the jury ought to be insulated from any version whatever, and to effect that that they at this point be locked up * * *."

The facts about which the Assistant United States attorney was talking were as follows:

It appears that on the morning of May 24, 1963, the second day of the trial for the defendant, one Walter Glockner, a shop steward and a member of the petitioner's Local 516, was shot to death in front of his home in Hoboken, New Jersey. The shooting occurred between 6 and 6:30 A.M. At 9 A.M. the Government attorney issued a statement to the press that the murdered man was to be interviewed by the office of the United States Attorney that day as a potential witness (See Appendix, excerpts from trial transcript.)*** According to the Hoboken police, Glockner had in a dying declaration attributed responsibility for the shooting to petitioner.*** The incident was given quick and wide coverage by the news and communications

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*** Quotation taken from Original Trial Transcript filed in this Court as Appendix to First Petition for Certiorari. The only portions of said Transcript to which we are referring in this Petition are pp. 75a to 81a, inclusive (Appendix F) and pp. 135a to 139a (Appendix G).

media.*** A person falsely described by the press as petioner's brother-in-law was arrested as a material witness, and there was a stream of prejudiced radio and television broadcasts and newspaper articles charging the responsibility for the shooting to petitioner (see 137A of the trial transcript).***

On the basis of this incident, the prosecutor, at the opening of the afternoon session on May 24th, renewed a motion for sequestration of the jury which he had made at the opening of the trial. After some discussion and after petitioner's then counsel had handed up to the court a newspaper account of the shooting***, the court directed the sequestration of the jury and stated that the jury had in fact been sequestered since the previous recess and had had lunch in the jury room. It appears in various parts of the record that the court on its own motion had United States Marshals placed at strategic entrances to the Court House and intercepted the jurors as they arrived at the Court House that morning, so that they could speak to no one.***

Thereafter the then counsel for the defendant alternatively requested the court to question each juror in camera as to whether he had heard anything concerning this incident, noting that since the incident had occurred between 6 and 6:30 A.M., one or more of the jurors might have heard of the incident on one or more of the radio news broadcasts before coming to court. The court refused that request and made no particular mention of the incident to any of the jurors. At that point in the trial and at various times thereafter on motions, the court stated that it sought to insulate this jury from the very information that it finally received.***

REASONS FOR GRANTING THE WRIT

A.

The facts alone require this Court to exercise its supervisory power to compel the District Court at least to make inquiry of the other jurors to determine if the defendant received a fair trial. The decision of the court below is in direct conflict with an applicable decision of this Court.

The facts are uncontradicted through the entire record that:

1. The court sequestered the jury in order that they could not possibly hear about the murder of Walter Glockner and his connection with the defendant.

2. In line with this desire to give the defendant a fair trial, the United States Attorney stated that "if the defendant is to be given a fair trial" the jury must not hear about the murder.

3. It is the undisputed fact in this case that the jury did hear about the murder of Walter Glockner and in some way connected it with the defendant.

There is no other conclusion to be reached on the basis of these facts, whether it is viewed from the position of the court, the United States Attorney or the petitioner, but that if the jury did hear about this murder, the defendant did not receive a fair trial.

It was held by this Court in *Marshall* v. *United States,* 360 U. S. 310, 79 S. Ct. 1171, 1173:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so

> prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. Michelson v. United States, 335 U. S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168. It may indeed be greater for it is then not tempered by protective procedures."

In the instant case it is apparent from the lips of one of the jurors that information, which was so prejudicial that the court sequestered the jury in order to avoid its hearing the same, did reach the jury.

B.

The ruling of the court below is in conflict with the decisions of other courts of appeals and its own rulings on the same matter.

A like situation faced the Third Circuit Court of Appeals in the case of *United States* v. *Kum Seng Seo,* 300 F. 2d 623. In that case the trial judge questioned but two of the jurors and did not bother to question the other ten. In writing the decision in that case, Chief Judge Biggs said (at pp. 624-625):

> "This case is ruled by Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959).
>
> * * *
>
> "The case at bar differs in some respects from that of Marshall. We do not consider it to be decisive under the circumstances that the trial judge examined only two jurors and no more, though this

too brief examination left the position of ten jurors unascertained. See Krogmann v. United States, 225 F. 2d 220, 228-229 (6 Cir. 1955)."

The Third Circuit was criticizing the District Court for not having applied proper standards by examining all of the jurors to see if the information had denied the defendant a fair trial. The court went on to conclude (at p. 625):

"Traditionally this court has taken the position, even in civil cases, that verdicts would be set aside where there was evidence that the impartiality of the tribunal had been affected or that tainted material had come before a jury. See McKibben v. Philadelphia & Reading Railway Co., 251 F. 577 (3 Cir. 1918). In criminal cases our rule has been strict. See Griffin v. United States, 295 F. 437 (3 Cir. 1924). The rule of other courts of appeals has been equally so. See Briggs v. United States, 221 F. 2d 636 (6 Cir. 1955). But whatever may have been the law prior to Marshall, since that decision it has been clear that a new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts containing inadmissible and inaccurate facts prejudicial to the defendant."

The ruling of the court below is further in conflict with the case of *McKibben* v. *Philadelphia & Reading Railway Co.*, 251 F. 577 (3 Cir. 1918). There, at p. 578, Judge Buffington said:

"It seems that while the jury was deliberating one of its members produced a newspaper article giving an account of the former trials of the case, the amounts of the verdicts rendered therein, and certain statements calculated to influence, if not, indeed, in-

flame, feeling against the defendant. That a single juror of a panel might be so recreant to his duty of impartiality as to produce such an article in a jury room is possibly to be expected; but when twelve jurors, of the character of men that should and usually do constitute federal juries, agree that such matters should be read to them, such a general situation, vitally affecting the integrity of the administration of justice, is disclosed as to make it the duty of this court to speak in no uncertain terms. We are not disposed to analyze or seek to determine just what problematic effect this unwarranted matter had on the jurors' minds, or at what stage of the proceedings the jury determined to have the article read. The noxious fact is that it had no place in the jury room, and that it was there, and was, at the request of the entire jury, read and heard. That the allegations of the article were harmful to and inflammatory against the defendant company, and that they were intended at some stage of the proceedings to affect the trial of the case, is evident by the fact, found by the judge below, that the article was 'inspired by the plaintiff, or by some one acting for him.' And that the article did come to the notice of a juror, that he was led by its contents to cut it out, to keep it through the trial, and to produce it in the jury room, and read it to all of his fellows, are facts tending to show that the purpose of this inspired article had been fulfilled. Under these facts our duty is clear to set aside a judgment rendered on a verdict given under such circumstances."

In addition thereto, the court refused to follow its own decision in the case of *United States* v. *McCorkle*, 248 F. 2d 1. There the court said (pp. 8 and 9):

> "The subsequently discovered undisputed facts make out colorable bias in a juror who was a part of a verdict which caused appellant and his confederate to be sentenced to death. The big practical difficulty with the proper resolution of the simple problem presented was that the shocking revelation about the juror came at a most inopportune time, long after this nortorious trial had ended and the defendants had been sentenced. The appeals had been exhausted, nothing remained except the execution of the sentences. When the news finally did become public there was a refusal to accept it for that it was, namley, a weighty prejudicial occurrence that may have destroyed a fair trial and which cried out for correction. The closeness of Kuhnle's connection with the trial content is frightening. At the argument it was conceded that the trial court would have insisted that he be excused."

The ruling of the court below refused to treat the present application for what it really is: a highly prejudicial error that comes to the attention of the court a long time after the trial but which cries out for correction.

In addition to being in conflict with its own decisions, the Third Circuit is in conflict with the Fourth Circuit, which held in the case of *Holmes* v. *United States*, 284 F. 2d 716, 718:

> "When, shortly before and during a trial, public news media irresponsibly publish incompetent and prejudicial information, the difficulty of maintenance of fairness in the administration of justice is manifest. That the work of the courts may continue without making jury service unduly burdensome, we are allowed to indulge an assumption that the individual

> jurors will observe the court's admonition and will not read articles or listen to reports about the subject of the trial. When it affirmatively appears however, that individual jurors have read newspaper articles containing information, incompetent if offered at the trial, that the defendant had been previously guilty of criminal conduct, the Supreme Court has held that a new trial is mandatory."

The ruling below is further in conflict with the United States Court of Appeals for the District of Columbia, where, in the case of *Coppedge* v. *United States,* 272 F. 2d 504, 507-508, the court held:

> "The inquiry made of the jurors by the court concerning their reading of the newspaper articles was not adequate for the protection of the defendant. The court knew which of the regular jurors had read the newspaper articles. No individual inquiry was addressed to these persons as to the possible influence of the articles upon each of them. Only a general and very brief inquiry was made of the jury as a whole. There was even then no admonition that jurors who had read the articles must not reveal their purport to the remaining jurors. It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial. Not only so, but had one or more of them said they would be so influenced, and especially if they had then explained why, the damage to the defendant would have been spread to the listening other jurors. In view of the nature of the articles the court should have made a careful individual examination of each of the jurors involved, out of the presence of the re-

maining jurors, as to the possible effect of the articles."

The Third Circuit ruling clearly is in conflict with the Sixth Circuit. In *Marson* v. *United States,* 203 F. 2d 904, the court held that it was the duty of the trial court to inquire of all the jurors whether or not they had seen or been influenced by the article. To this effect, see also further decisions of the Sixth Circuit: *Briggs* v. *United States,* 221 F. 2d 636, and *Krogmann* v. *United States,* 225 F. 2d 220.

The Seventh Circuit, in the decision of *United States* v. *Accardo,* 298 F. 2d 133, comes into direct conflict with the Third Circuit ruling in this case. In that case Judge Kiley, speaking for the court, says (p. 136) as to what the action of the trial court should be:

> "He should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others. Coppedge v. United States, D. C. Cir., 272 F. 2d 504, 508 (1959). These individual interviews would have tended to overcome reluctance to speak out."

In addition thereto, the Third Circuit ruling is in conflict with the ruling on procedure as outlined by this Court in the case of *Remmer* v. *United States,* 347 U. S. 227, 74 S. Ct. 450, wherein it was held at pp. 451 and 452 of the Supreme Court Report what the proper procedure of the District Court Judge should be:

> "We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent

in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

"We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial."

C.

The denial of the right to the defendant by the trial court to subpoena the jurors in order to determine whether or not they had heard the report of the murder was a violation of the Sixth Amendment.

The Sixth Amendment to the Constitution of the United States provides that the defendants in all criminal prosecutions shall have the right to have compulsory process for obtaining witnesses in their favor.

When the trial court indicated that it would not permit the attorney for the defendant to examine any of the jurors in relaxation of Rule 23 (now Rule 19G), the attorneys for

the defendant asked for the right to issue a subpoena without running the risk of violating the court order and local Rule 23 (now 19G): (See 288a-1 to 20). The court denied the right to issue a subpoena.

It is most respectfully urged that the Constitution itself contains no restrictions or conditions on the enjoyment to the right of compulsory process, and it is urged that the legislature could not constitutionally make any limitations. Therefore, the courts cannot place any limitation on the right to subpoena witnesses.

If the idea of the trial court was to protect the jurors from harassment, there was a proper remedy. Anyone who unduly violated the privacy of a juror could be held in contempt of court, and this should be the proper remedy.

A similar case was before the Supreme Court of Arkansas in 1894: *Aiken* v. *State,* 25 S. W. 840. There the defendant was indicted for murder and he applied to the clerk of the court for subpoenas for 18 witnesses. He was refused because of the existence of a rule in that court prohibiting the issuances of more than five subpoenas without an order of the court, obtainable on application and a showing of materialitiy. The court in that case declared such a rule unconstitutional on the grounds that no local rule can supersede the compulsory process clause of the Sixth Amendment.

In effect, what the court below has done is to limit the defendant in a practical and legal way from ever attempting to bring before the attention of the court the irregularities which he alleged occurred in the jury room and which, as a matter of fact, have been admitted to by one of the jurors.

A simple solution to the entire question is to have the twelve jurors interrogated by the court and counsel in con-

formity with *Remmer* v. *United States, supra,* and *Rubenstein* v. *United States,* 277 F. 2d 638, and if what the defendant alleges is not true or does not appear to be true, then his application should be denied. But on the other hand, if it appears that what he alleges and what one of the jurors admitted to be a fact is true, then he should be granted a new trial because he has not received a fair trial.

The effect of the ruling below would sanction a new rule of law which would permit the trial court to pass upon, in advance, the evidence which it would allow a defendant to produce in his fight for freedom, and further permit the trial court to limit him in his efforts to seek out evidence by which he could find his freedom.

This Court should immediately exercise its powers of supervision and inquire into the alleged violations of the constitutional guarantees of the petitioner. If the holding of the court below is permitted to remain in effect, a rule of law will have been created which will do great injustice to all defendants in future trials. The least that this Court should do in order to guard the rights to a fair trial is to direct the court below to examine all of the jurors to determine if the defendant received a fair trial.

CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of criminal law that an authoritative determination of the same should be made by this Court. Accordingly, petitioner asked that this Court issue a writ to review the judgment below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 15,905

UNITED STATES OF AMERICA

vs.

ANTHONY PROVENZANO,

Appellant.

(D. C. CRIMINAL No. 429-60)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE —— DISTRICT OF NEW JERSEY

Present: STALEY, *Chief Judge,* KALODNER, *Circuit Judge,* and SHERIDAN, *District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United District Court for the —— District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed May 5, 1966, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

June 20, 1967.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 15905

UNITED STATES OF AMERICA

v.

ANTHONY PROVENZANO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 8, 1967

Before STALEY, *Chief Judge,* KALODNER, *Circuit Judge* and SHERIDAN, *District Judge*

Opinion of the Court

(Filed June 20, 1967)

PER CURIAM

On review of the record we find no error. The Order of the District Court of May 5, 1966 will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX C

Oral Opinion of District Court on Motion to Vacate Judgment, etc.

(40)* AFTERNOON SESSION .

(2:15 p.m.)

The Court: This is a motion pursuant to Rule 33 to vacate a final judgment of conviction and for a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence consists of statements of a juror, Henry Hurowitz, that he was prejudiced against the defendant and that the jury in reaching its verdict considered matters unrelated to the evidence. The name of the juror as set forth in the moving papers is stated to be Henry Horowitz, spelled H-o-r-o-w-i-t-z. During the course of the testimony of one of the defendant's witnesses, William V. Bradley, the Court directed attention to the fact, apparently unknown to his witness, that the correct name of the juror was Harry H-u-r-w-i-t-z.

The chronology of events in this case up to the point of this motion are set forth in previous opinions reported in the United States v. Provenzano, 334 F. 2d 678, Third Circuit, 1964, certification denied 370 U. S. 947; U. S. v. Provenzano, 240 Fed. Supplement 393, 1965.

Briefly, for the purposes of this opinion, the (41) following may be noted: After a lengthy trial during which the jury was sequestered it brought in a verdict of guilty on June 13, 1963. Sentence was imposed on July 12, 1963. An appeal was taken and the conviction was affirmed and certiorari denied by the United States Supreme Court. The mandate on affirmance was filed with the Clerk of this Court on December 31, 1964. On January 5, 1965, a notice

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

of motion for new trial was filed. After a lengthy hearing on this motion the Court found that there was no merit to defendant's contention that a juror, Cassidy, had been prejudiced against the defendant and not qualified to serve on the jury.

Notice of appeal from this determination by this Court was filed on April 1, 1965. The appeal was determined by an affirmance of this Court's decision by the United States Court of Appeals for the Third Circuit and denial of a petition to the United States Supreme Court for certiorari.

On April 27, 1966 the mandate affirming the previous order of this Court was filed. Thereafter these proceedings were brought alleging the prejudice of the Juror Hurwitz and misconduct of the jury in considering matters not in evidence in reaching their verdict.

(42) Defendant seeks leave for the purposes of this motion to interrogate the juror, Harry Hurwitz, or to have this juror summoned to court to testify. It is alleged that he has confessed prejudice toward the defendant and would be willing to admit it as well as to relate other matters which improperly influenced the jury in arriving at the verdict of guilty. What defendant seeks is an opportunity to permit this juror to impeach his own integrity by statements of his disqualifications to serve as a juror and opportunity for this juror to relate if he was so minded what he and the other jurors considered in arriving at the guilty verdict.

In substance what defendant seeks to elicit from the lips of this juror in part is that his responses on the voir dire were false and that knowing he was not qualified to serve as a juror he nevertheless willfully concealed such fact from the Court. If this be true the implications would be serious.

Appendix C

An underlying question of the motivation factor is presented.

Nearly three years have elapsed from the date when the verdict was returned. This juror, according to the record before the Court, had been silent until January or February of 1965 when he is alleged (43) to have engaged in conversation first with Mr. Duffy, a friend of Mr. Bradley, and subsequently with Mr. Bradley, ex-president of the Longshoremen's Union, and a close friend of Mr. Provenzano. According to the testimony of these witnesses, which the Court heard here, the juror sought their aid and advice to clear his conscience. Mr. Bradley was a volunteer to assist him.

When matters allegedly related by Mr. Hurwitz were brought to the attention of counsel for Provenzano, Mr. Duffy refused to sign an affidavit setting forth what Hurwitz had allegedly told him. Mr. Bradley executed an affidavit of recent vintage in support of the application now made to this Court.

That affidavit summarizes in general terms the purport of the alleged conversations in which the juror allegedly engaged with Mr. Bradley and Mr. Duffy. Though Mr. Bradley testified that Mr. Hurwitz hold him that there had been a transistor radio in the jury room at the time the jurors were deliberating, which carried reports relating to the trial, no mention of this was made in Mr. Bradley's affidavit. That affidavit was prepared in the office of counsel, presumably after (44) interrogation by counsel as to what Mr. Bradley knew. Nor, except in terms of generalities, was any mention made of any specific information that came to the jury's attention through this radio by news broadcast.

Appendix C

After Mr. Duffy and Mr. Bradley had engaged in conversation with Mr. Hurwitz concerning what occurred during the deliberations of the jury and the part that Mr. Hurwitz played, at least one meeting has held with counsel for Provenzano. This meeting, according to the testimony I heard here, was at a motel. It may have been in August of 1965 or it may have been much earlier than that. The time it was held could not be definitely established by Mr. Bradley's recollection. Mr. Duffy in his testimony at first denied that there had ever been any meeting except on the street in Jersey City. Later when pressed he finally recalled that there was a meeting held in a bedroom of the motel at which counsel was present. His recollection as to the approximate time even as to the month was likewise faulty.

Mr. Bradley's testimony was to the effect that this meeting was held in a meeting room at the motel especially arranged for purpose of discussing (45) the information that Hurwitz would be willing to furnish to impeach the jury verdict. Then there is one strange aspect of Mr. Bradley's testimony. Though he admitted to a long acquaintance with Mr. Provenzano and to the fact that he was a friend of Mr. Provenzano, and as far as the testimony disclosed the meeting was in a room that was not particularly large, and few people in attendance, he couldn't recall whether Mr. Provenzano attended that meeting or not. When he was asked if he wouldn't have noticed him in the room, he stated that he was turned partially in a chair and Mr. Provenzano may have been over on the other side, but because he never turned around he wasn't sure that he was there or not.

Parenthetically, it may be noted here in connection with the discrepancies and contradictions that appear in the tes-

mony that by order of the Court neither of these witnessess was permitted to hear the sworn testimony of the other. The same rule was applied with respect to the third witness, Jack Zukosky.

Brief reference might be made to some of the discrepancies and contradictions which were developed during the course of the testimony, and which lead the Court to the conclusion that most (46) of it is so incredible that standing alone no weight should be given to it. There was contradictory testimony about how Mr. Duffy met with Juror Hurwitz and the extent of further participation by Mr. Duffy thereafter. There is failure of recollection as to when, if ever, the information obtained was brought to the attention of Mr. Provenzano. There is testimony that there was a television set operating in the jury room in this Court House when the jurors were deliberating. This is obviously ridiculous. It had been represented by counsel in connection with the appearance of the Witness Zukosky, who regrettably was taken from his business to come here, that he was the one who had introduced the Juror Hurwitz to Duffy. This was denied by Zukosky who impressed the Court with his candor and the manner in which he gave his testimony.

The alleged conversations with the Juror Hurwitz were supposed to have taken place initially in a small store that Mr. Zukosky owned and operated in Jersey City. At this hearing Mr. Zukosky, who impressed the Court, stated that he had known Mr. Hurwitz for thirty-five years as a friend, and that he never heard him mention any prejudice against Mr. Provenzano, although he was a frequent visitor in (47) that store. He described Mr. Hurwitz as an honest man.

Appendix C

When questioned neither Mr. Duffy nor Mr. Bradley could state that Mr. Hurwitz ever gave any reason for his alleged prejudice. There was no factual background out of which prejudice could be reasonably inferred prior to the trial. In fact, these witnesses reluctantly admitted that they had obtained no such factual information which would provide any logical reason for prejudice existing in the mind of Mr. Hurwitz prior to the trial. Mr. Hurwitz had not given them any reason why he was prejudiced.

According to one part of the testimony of Mr. Duffy the Juror Hurwitz told him that his decision to vote for a verdict of guilty was unfair because he "just went along with the tide."

When Mr. Bradley was examined as to what occurred at this motel meeting he again had failure of recollection. He could not recall anything in particular except that he attended and that the meeting had been called for the purpose of discussing the Juror Hurwitz. As mentioned he could not recall whether Mr. Provenzano attended this meeting or not. He could have been there, according (48) to Mr. Bradley and overlooked by Mr. Bradley though this meet took a considerable period of time.

Mr. Bradley sent Mr. Duffy to an attorney for the defendant for the purpose of signing an affidavit relating to the prejudice of Mr. Hurwitz. Mr. Duffy, according to his testimony, had no acquaintance with this attorney. He denied being sent to him.

There was conflicting evidence as to whether an affidavit had been prepared for Mr. Duffy's signature at that time or whether one was subsequently prepared. Mr. Duffy did admit that an affidavit was tendered to him for signa-

ture, but he stated that the language of it did not represent a true version of what Mr. Hurwitz had related to him. This affidavit was modified to meet his objections, but he still refused to sign.

Somewhere along the line he decided that he did not want to become involved. That affidavit or the modified affidavit has never been produced here, and no one seems to know where it is, although it had been, according to the testimony, prepared by counsel.

I am not speaking of counsel presently appearing in the case.

There is inconsistency in the testimony as to (49) the nature and extent of preparation by counsel in the matter of developing information as to the alleged prejudice of Juror Hurwitz. Numerous other inconsistencies and discrepancies appear throughout the record of the testimony of these two witnesses, Duffy and Bradley.

The Court observed each carefully while he was on the stand and particularly noted the evasive, equivocal nature of answers to questions, the lapse of time between question and answer as to material facts, the uneasiness of each witness on the stand, and the general demeanor which did not impress the Court as to either witness with the fact that he was willing to disclose in factual detail information which would shed light upon the whole truth. In fact, the Court has no hesitation in saying without any reservation that it has rarely ever encountered witnesses like Mr. Bradley and Mr. Duffy whose contradictory statements under oath were so notable and whose demeanor in giving testimony was so unimpressive.

There was an overtone of desire to dissassociate the occurrences which they related with any investigation spon-

sored by or conducted on behalf of Mr. Provenzano, or any association that Mr. Provenzano (50) had with such activities.

At the conclusion of the testimony the Court stated its tentative conclusions with respect to the testimony in order to afford counsel opportunity to argue the points raised, and those statements of the Court at the conclusion of the testimony are incorporated herein by reference. At the conclusion of the Court's statement after all the testimony that was offered was heard the Court asked counsel if the defendant would be willing by himself or through others to offer testimony as to the circumstances under which investigation of the Juror Hurwitz was initiated, and fix the time and place and circumstances of the detailed activities in connection therewith.

The Court posed this question because, as the matter then stood, it had all the earmarks of a continuing investigation of jurors which was begun almost immediately after the trial and the verdict of guilty, and conducted on a very broad scope and exhaustively. As to the nature and extent of such investigation see the previous opinion of the Court in United States v. Provenzano, 240 Federal Supplement 393, 1965.

The Court was particularly concerned with whether (51) any statement alleged to have been made by Mr. Hurwitz was spontaneously and voluntarily made or induced under circumstances which would reflect upon the reliability thereof. As the Court has pointed out during the course of argument, this jury was sequestered during the course of trial to assure that it would not be subject to any extraneous influences generated through publicity or through any source whatsoever. Every reasonable precaution was

taken for the protection of the defendant's rights in this matter and for the protection of the public interest.

After the jurors were discharged the insulation against such extraneous influences was removed. Under these circumstances it is deemed by the Court to be its function to inquire as to how subsequent information may have been developed. It may well have been developed under circumstances where it would be the duty of the Court to suppress the evidence, not only because it was obtained during a continuing investigation and in violation of the rule of Court, but also and more importantly by reason of motivating factors which might indicate that the alleged statements of the juror could not be, as made now, considered reliable.

(52) I pause here for a moment to touch upon some of the allegations. Mention is made of the murder of Glockner. This Court knows as a fact that there was no public release of that information by any news media, newspaper or radio, before those jurors were sequestered in the jury room. I gave instructions to the marshal that morning that when each juror arrived at the Court House he or she was to be taken to that jury room, and they were not to be permitted access to any outside information.

I note that that question was raised on the first appeal, but the Appellate Court found that no proof was offered that the jurors had been exposed to any such impression.

It is notworthy in connection with that that while those jurors were sitting in that jury room and not permitted to leave by my order or to have newspapers or anything brought in to them, counsel for the defendant was standing here and arguing against sequestration, saying, as the record will disclose, "Judge," in substance, "it is not

necessary. You can cure any prejudicial effect by remedial instructions." I deemed it to be my duty, aside from anything counsel said, to give the defendant the full protection of his constitutional rights. (53) He had that protection.

Some of the other allegations with respect to the fire and other things which occurred are equally ridiculous as I know of my own personal knowledge.

In essence the defendant comes before this Court and says, to put it bluntly, "I have a juror whom I will tender to you and he will confess that he has been guilty of wrongdoing, amounting to willful conduct to obstruct the administration of justice." The Court made it clear to counsel that it did not think it would be proper for a representative of the defendant or a representative of the Government to interview the juror and also that it would not be proper for the Court to interrogate the juror privately out of the presence of counsel.

If the Court were to take the drastic action of eliciting information from this juror it should only be done by bringing him into court by order and interrogating in the presence of counsel for the defendant and counsel for the Government with opportunity to cross-examine.

If the integrity of the jury system is to be maintained jurors must be free from harassment at the hands of a disappointed litigant after a verdict (54) has been rendered. The defendant has a constitutional right to a trial by a fair and impartial jury free of any misconduct in arriving at their verdict, but, as pointed out in the earlier opinion in this case, the jury verdict has presumptive validity and inquiry into the thinking of jurors in arriving at that verdict should not be permitted except upon good cause shown as provided in Local Rule 23.

Appendix C

After consideration of the opportunity afforded by the Court to the defendant to make further disclosure of any investigation that was conducted, and all the circumstances thereof, counsel advised the Court that the defendant would rest here upon the evidence presented by the testimony of Zukosky, Bradley and Duffy. According to the statement of counsel made in argument this decision was arrived at with the defendant and counsel who had previously represented the defendant.

One who seeks justice on a motion of this kind comes before the Court with ill grace when he deliberately and perhaps for strategic reasons withholds information that will aid the Court in finding the truth. It is the whole truth that is desired—not so much of it as it is felt (55) strategically wise to offer. This is a suitation where it is urged on the one hand that that truth should be made known through the lips of a juror while on the other hand the defendant does not want the whole truth by presenting evidence within his knowledge and control.

It was pointed out in argument that the Court has the power on its own motion to compel disclosure, but the sources of the evidence which could be developed for such disclosure lie within the knowledge of the defendant and those who represented him in the matter of such investigation, if any, as was undertaken, and the defendant is not willing to come forth with the proof. He does not deny the existence of the information. He does not wish to have it disclosed.

The court feels no obligation on his behalf to speculate as to where it may be found.

No doubt there are records of the conferences and meetings with reports of information that Mr. Duffy and Mr.

Bradley obtained together with dates and circumstances. There is also the matter of the initial and revised affidavit which was tendered to Mr. Duffy which he refused to sign. This, according to one version of the testimony, purported to set forth what Mr. Duffy had learned from Mr. Hurwitz, but Mr. Duffy refused to sign the (56) affidavit tendered to him because, according to his testimony here, those affidavits did not truly express what had been related to him. Well, now where did the information come from which was incorporated in these affidavits? It would be interesting to see those affidavits. I have no knowledge where they may be. Neither does the Court know how much information concerning the Juror Hurwitz was in the possession of the defendant and those representing him at the time of the previous hearing before this Court relating to prejudice of Juror Cassidy.

One inference clearly emerges from the testimony. During the year 1965 and no later than August of that year whatever Mr. Hurwitz said to Mr. Duffy and Mr. Bradley was known to defense counsel and no action was taken at that time. As noted the information may have been available even before the hearing on the first motion with respect to Juror Cassidy and perhaps before that hearing was completed and judgment in this court entered.

The further inference is that either the information then known was of no particular consequence and did not warrant directing the Court's attention to it or the defendant deliberately (57) chose to hold that information to await the outcome of the pending appeal. It was not necessary for him to do this under Rule 33. He was represented by knowledgable and competent counsel. Application could have been made to the Court, and on the finding of the Court that there was merit to the application a remand

from the United States Court of Appeals to this Court would have been requested so that all matters then known could be expeditiously disposed of. One who alleges that he seeks justice stands on a poor footing when he engages in conduct calculated to delay the administration of justice.

The defendant had the opportunity to clear up some of these questions right here in this court at this hearing. He has not sought to avail himself of that opportunity.

It is obvious to this Court from the record now before it that the predominant motive is to get a juror on the stand to pick into the deliberations of the jury with a speculative hope of finding something that will support perhaps not only the application with respect to the Juror Hurwitz, but perhaps further applications with respect to other jurors. It is doubtful from the record in this court on the previous motion and this record whether jurors in any case have ever been (58) investigated more exhaustively than the jurors in this case. This kind of thing strikes at the heart of the integrity of the jury system.

Any litigant coming in to court to impeach the verdict of a jury by interrogation of jurors should first demonstrate to the Court that there is good cause. Such relief should be granted only in exceptional circumstances where there is a clear showing of likelihood that a constitutional right of a defendant has been violated. Such relief should not be permitted on the basis of surmise, conjecture, or incredible evidence.

The defendant is entitled to due process, but so also is the public. Jurors when sworn become members of the court. They perform a civic duty at great sacrifice and individual inconvenience. This was particularly true in this

case where they were sequestered for approximately three weeks and held incommunicado from friends, family, and all other outside sources of information.

On a motion of this kind the defendant has the burden of proof. It has not been demonstrated by any credible evidence now before this Court that he has the right to have the Juror Hurwitz summoned before the Court for examination.

(59) Like the defendant the juror also has constitutional rights, and he should not be subjected to harassment except upon a clear showing that there is likelihood that an injustice has been perpetrated by his conduct. In fact these proceedings in and of themselves must be very disturbing to jurors. I was acutely aware of that situation in the earlier motion, and unless this Court takes a firm hand in proceedings of this kind perhaps investigation will never cease as far as these jurors are concerned.

The Court finds the testimony of the witnesses, Duffy and Bradley, absolutely incredible. If there be a grain of truth in it, it is so totally obscured by the discrepancies and contradictions that the truth escapes detection.

If on the basis of such testimony as to good cause to examine a juror such examination were allowed jurors in any case could be freely interrogated by any disappointed litigant and local Rule 23 would be completely sterile. We would be giving lip service to the general immunity which jurors should enjoy from harassment after the trial is over.

The Court views this as a situation where there (60) is nothing except naked allegations of prejudice and misconduct. They are naked allegations because they are not supported by any credible proof, and I will defy any reasonably minded person to read the record of testimony and

come forth and tell me if he can believe anything that Mr. Duffy and Mr. Bradley said. Certainly it would take a genius with a crystal ball to find the truth in that testimony obscured, as I say it is, in such numerous contradictions and discrepancies, failure of recollection, evasion, equivocation.

I emphasize here again that there is a withholding of information which would shed light on the fact of whether a statement allegedly made by Juror Hurwitz was spontaneous and voluntary as distinguished from statements procured in an intensive continuing harassing investigation of jurors.

This is not a situation where the defendant has no obligation to testify. He is not presently on trial enjoying the immunity from taking the stand if he chooses to exercise it. This is his motion and the burden of proof is upon him, and he has a duty and obligation to the Court if he expects relief from the Court to aid the Court in finding the (61) whole truth.

The Court finds that the defendant has failed to show good cause why the Juror Hurwitz should be summoned to explain his vote for a verdict of guilty as well as to relate what he, the juror, deems to have been the thought processes of his fellow jurors in joining with him in that vote.

Parenthetically it may be stated here that nothing in this opinion is to be construed as casting any reflection upon the integrity of Juror Hurwitz. Standing alone the testimony of the witnesses, Duffy and Bradley, has no probative value.

The Court further finds that due diligence was not exercised in bringing this matter to the attention of the

Court, and for that reason the defendant is entitled to no relief at this time.

It is true that under Rule 33 the defendant has two years after final judgment within which to move for a new trial on the ground of newly discovered evidence. The rule provides in pertinent part: "A motion for a new trial based on grounds of newly discoverel evidence may be made only before or within two years after final judgment." It may be noted that the language of the rule does not state that the motion can be brought at any time (62) within two years. If that were the intent of the rule there would be no purpose for the words "only before."

Therefore, it is not intended by the rule that a litigant in possession of newly discovered evidence of the nature claimed to exist here can sit by and bring his motion only after a previous appeal has been terminated. He has the right to bring the motion when the newly discovered evidence becomes known and the Court may after consideration of it determine whether it has any merit, and if so, may seek to have the case on appeal remanded.

The restriction upon the trial Court is only with respect to granting the motion, not with respect to entertaining it. Once the case is remanded the motion may be granted. Following the procedure of bringing matters of this kind promptly to the attention of the Court so that a remand could be sought facilitates the expeditious disposition of litigation and precludes delaying tactics. In this particular instance it is the opinion of the Court that if the defendant had credible evidence of misconduct of one or more jurors during the year 1965 when his appeal was pending he failed to act in good faith in making (63) prompt application to this Court to present such evidence so that the Court could determine whether a remand should be sought.

In connection with this the Court emphasizes again that in such instance there would be a duty, as I feel there is here, to bring to the attention of the Court all of the evidence rather than what the defendant seeks to disclose for strategic or other reasons.

In conclusion the Court finds for the reasons stated that the motion of the defendant to vacate the final judgment of conviction and grant a new trial as well as the collateral motion for leave to have Juror Hurwitz interrogated should be denied, and the Court will enter an appropriate order in conformity herewith.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ANTHONY PROVENZANO.

Criminal 429-60

Findings of Fact Supplementing Those Stated in Oral Opinion

Subsequent to hearing and dictation of oral opinion upon the record, the Court furnished the Federal Bureau of Investigation with Exhibit C-1 in evidence to obtain by laboratory inspection and examination thereof information as to the kind of machine which had produced this exhibit. The exhibit consists of two original letters addressed "To Whom It May Concern" and signed by the juror Harry Hurwitz. Counsel were advised of the action taken by the Court. This was done because the Court had serious doubt whether these two original letters had been produced on a manual typewriter as testified to by the juror Harry Hurwitz. The report of the Federal Bureau of Investigation dated February 17, 1967, has been obtained and, with consent of counsel, has been marked in evidence as Court exhibit C-10 in evidence.

Appendix D

The contents of the report were made known to counsel with opportunity for cross-examination of the agent conducting the laboratory tests. Counsel for defendant advised that he had no objection to having the report of the Federal Bureau of Investigation marked as an exhibit and that he had no wish to examine the agent who made the report. A copy of the letter of counsel dated February 23, 1967 will be marked Court exhibit C-11.

Since the hearing the Court has had opportunity to review previous proceedings in this matter, particularly with reference to alleged prejudice of the juror Elizabeth Gautier, and finds that it was her husband, Mr. Arsene Gautier who had been interviewed during or shortly after October, 1963 at police headquarters in Fanwood, New Jersey, where he appeared in response to the summons of the Chief of Police for the purpose of making him available for interview by one of the defendant's investigators, Leon Neidorf. The interview which took place in a room made available at police headquarters for Mr. Neidorf lasted approximately one hour.

This must be considered together with the present and belated allegations from the lips of the juror Hurwitz that he learned from the juror Elizabeth Gautier that she was prejudiced because the defendant, Provenzano, had put her husband out of business. It may be noted also, according to the testimony of Mr. Hurwitz, that she mentioned this after the trial. Apparently, if any of his testimony is to believed, it was not of sufficient significance to this juror to mention it while the jurors were deliberating. Moreover, anything that Mr. Provenzano may have had to do with the affairs of the husband of this juror, Arsene Gautier, could certainly have been checked out from the union records.

Anything that Mr. Neidorf learned from the husband of this juror in connection with the Provenzano trial did not seem to be of sufficient importance to raise directly at any time before the juror Hurwitz came into the picture.

Defendant now seeks to interrogate the juror Elizabeth Gautier. This kind of thing could continue indefinitely until the entire jury of twelve have been brought in for interrogation. The Court does not suggest that if there is credible evidence of misconduct on the part of any juror, that inquiry should not be conducted. The Court has reiterated many times in these protracted and piecemeal proceedings for a new trial that the defendant had a constitutional right to a trial by a fair and impartial jury of twelve but that the defendant, in seeking the aid of the Court, had the obligation to come forth and make full disclosure as to all investigation conducted with identification of and number of investigators employed, and the circumstances under which they operated and in conjunction with whom.

Whatever of consequence was known as of the time of the application for a new trial because of alleged prejudice on the part of the juror Cassidy should have been brought promptly to the attention of the Court. If there be any truth in the belated allegations of prejudice, a question is posed as to why information was withheld until after the Cassidy hearing was concluded. In the case of juror Hurwitz it appears obvious from the record that whatever was known of his alleged prejudice became known in the early part of 1965. Yet there was on application made with respect to his alleged prejudice until long after the alleged discussions that he had with Mr. Duffy and Captain Bradley, who, it now appears, were functioning as investigators for the defendant.

Appendix D

The Court had reached the conclusion during the latter stages of the repetitive applications for renewed hearings that the time had come for the Court to take complete control of the proceedings and to determine who should be brought in for interrogation, and that the Court should be fully informed as to the nature and extent of all investigation conducted and by whom in order to evaluate the factors which may or may not have induced any juror to impeach the verdict. Sequestration of the strict nature imposed in this case would be a complete farce if, after insulating the jury from all outside influence which might affect a fair and impartial trial both as to the defendant and the public, the jurors, after discharge and subject to such outside influence, could be brought back on application of the defendant to impeach the verdict that they had reached. The least that can be said of such a situation is that the Court in preserving the integrity of the administration of justice, should proceed with great caution and circumspection and take under consideration all of the circumstances which could cause a juror to retract a vote of guilty on the ground that he or she when casting; such vote was prejudiced.

The allegation of the juror Hurwitz that he was disturbed by the fire at the Essex House and that it had its effect upon the vote which he cast is hardly credible. He himself did not associate the origin of the fire with Mr. Provenzano or anyone acting for him. This Court had immediate notice in the early hours of the morning of the fact that there was a fire and, in following the situation through, found that it was of no particular consequence in terms of the safety of the jurors and did not require removal to another hotel. The safety of each juror was perhaps more assured than that of any other guest at the hotel because

of the constant surveillance through the night by the deputy marshals of the floor upon which they were quartered.

The testimony of the juror Hurwitz, summarized in the light most favorable to the defendant, would establish no more than the following. The fire at the hotel was a coincidence that disturbed him. A juror mentioned while the jurors were deliberating that a man by the name of Glockner had been murdered. He assumed it had something to do with the case, but the name Glockner meant nothing to him. He did not know whether this juror had told anyone else about Glockner. Information furnished by a juror to him to the effect that her husband was allegedly put out of business by the defendant was furnished after the trial. The juror Hurwitz concludes in his letter addressed "To Whom It May Concern" that all of this caused him to be prejudiced. As noted, his testimony under oath was to the effect that he became convinced that the defendant was guilty before any of these allegedly disturbing factors came to his attention and that he never changed his vote. But when he did have access to newspaper information disseminated to the public during the course of trial, and which had not been available to the jurors, it then seems that he decided that he should not have voted for a guilty verdict. The rationale is incredible.

One further comment should be made. The Court observed this juror very carefully during the time that his testimony was being given. He was not nervous, but there was a furtive air and an apparent undertone of concern. There were discrepancies and contradictions in his testimony and considerable hesitation and delay at times in responding to questions. He did not impress this Court as a person speaking with complete candor, and with sincerity

out of any spirit of remorse for some wrongful act that he had done. Most noteworthy was his lack of recollection in many instances of things which would seem, in the context of his alleged brooding over the trial, to have been clearly fixed in his mind.

There was in particular, in connection with his recollection, a failure to relate the substance of what he had stated in his letter. He admitted that he had refreshed his recollection from a copy on the very day that he testified, but when asked by the Court, without having the copy before him, to relate the substance of what was in it, he omitted a significant part. This occurred again when the question and answer were read slowly back to him.

This Court held a hearing on the basis of the statement which this juror sent to the Americal Civil Liberties Union because it felt in the interest of economy of judicial effort that his testimony should be taken and a determination made of whether request for remand for the purpose of granting a motion for a new trial should be granted. Further, in the event the Court was not satisfied that a motion for a new trial should be granted, the record of this testimony could be brought before the United States Court of Appeals to be considered in conjunction with the testimony of the other witnesses and evidence now before the United States Court of Appeals. This Court is not inclined to grant a motion for a new trial on the ground of newly discovered evidence, first, because it has not found credible evidence of prejudicial conduct on the part of a juror during the course of trial whereby defendant was denied his constitutional right to a fair and impartial trial and, second, that the alleged newly discovered evidence was known to exist and either deliberately withheld or felt to be of such

little consequence by prior counsel that no timely action before this Court was taken on it.

An order will be entered by the Court in conformity with the foregoing and the oral opinion of the Court dictated upon the record at the conclusion of the hearing, which this opinion supplements.

APPENDIX E

Letter from Juror Hurwitz

June 30, 1966

To Whom It May Concern:

Prior to the period of time when I sat on Tony Pro's jury, I was employed as a salesman. My territory was in the office building of Tony Pro's attorney, Jack Friedland, and was in the area of Michael Comunale's office. At that time Mr. Comunale was an assistant prosecutor.

On one occasion during the period of time when I was a salesman, I accepted a check from one of my customers who had a cigar store in payment of an invoice. The check was made payable to Michael Communale and was issued by the Dorn Transportation Company.

During the trial, at least one juror was in possession of information regarding the murder on Friday morning in Hoboken. This same juror also told that Tony Pro was responsible for putting her husband out of the trucking business. I believe that she was prejudiced because of this information.

At different times the jurors discussed the fire in the Hotel Essex, where we had been quartered one Saturday morning during the trial. The fire caused me great concern and other members of the jury said that they were bothered by it. I was afraid of bodily harm as a result of this fire.

All of the facts as set forth above prejudiced me in making up my mind when I sat on that jury.

Very truly yours,

Harry Hurwitz

Frederick L. Starr
Notary Public of New Jersey
My Commission expires Sept. 8, 1969

APPENDIX F

Excerpts from Original Trial Transcript (pp. 75a to 81a)

(75a) Noon Recess

(60) Afternoon Session

(Side bar conference.)

Mr. Boylan: As I indicated earlier, there was an incident this morning in which Mr. Walter Glockner, a shop steward at Dorn Transportation terminal and a member of Local 560, was shot.

The Court: That is the same Local?

Mr. Boylan: Yes. He was shot and critically wounded as he left his home. Nobody knows the exact sequence of events leading to it, although the F.B.I. has indicated there are two versions given to the Hoboken police at the time of the shooting, one by Glockner to the effect that the present defendant in this case was responsible for the shooting, and the other mentioning names that mean nothing to us, and I don't know anything about that, as to the possible assailants.

The other version is that they were unidentified assailants who shot him down, and this is from the man himself, but that they were acting on behalf of Local 560.

The Court: Is the man dead?

Mr. Boylan: He's almost. They don't think he will pull through. That was the last from St. Mary's (61) Hospital.

Now, we have been beseiged by the press with respect to Mr. Glockner's participation, if any, in this trial, and what his relationship is to the case. We have declined to give any comment at all. The only statement I gave at 9:00 o'clock this morning was that—this was in connection with this case—it is a fact that Mr. Glockner was to be interviewed by our office today and as a potential witness. I

say potential. Nobody knew what, if anything, he knew about the facts in this case. Any one of these versions of the shooting which would get in the press I think would be highly prejudicial and inflammatory towards the defendant, and I think Mr. Singer is in possession now of other information that the local Labor Department is going to file some kind of complaint against the union. I think in view of those facts that if the defendant is to be given a fair trial that the jury ought to be insulated from any version whatever, and to effect that that they at this point be locked up and that we do everything to expedite the trial of this matter, both for their convenience and everybody else's in order that we may avoid a motion in this trial at some subsequent date because goodness knows with this information out what version of it (62) will be given to the press. Whether authorized or not we would be held in some way responsible for it.

The Court: Mr. Singer?

Mr. Singer: I don't see how anybody could insulate the jurors from any situation like that. It is a practical and physical impossibility even if you locked them in the jury room in this courthouse. Now, it just seems to me that we have not gone too far in this case to where there has been any great disclosure of evidence. I have the suggestion that we stop at this point and wait until Monday and see what the press does show, see what the stories are, and if nothing develops, it just dissolves into thin air. Let's go on with the trial. A lot of rumors don't disturb me a bit. I am sure the Court could take care of the rumors in its charge. We could in our closing statements, or in any statement the Court would let us make, and on the other hand if it should turn out that there was any such prejudicial situation I can't see what there is at this time in this atmosphere at all. No great harm would come to anyone

if I moved for a mistrial and you consented, because as you said, we couldn't get a fair trial in this atmosphere and we delayed it until fall. There has been no disclosure of any evidence by the Government (63) that would harm, just some few records offered in evidence, nothing in the opening of the Government, so I suggest that if you want to stop now and wait until Monday morning and see what happens, I'm in favor of it.

If you want to go on with testimony—

Mr. Moroney: I think that would be sound.

Mr. Singer: To lock jurors up you might just as well tell them that it is impossible—

Mr. Moroney: If this man and the victim here gives a statement, this man may be arrested on such a statement immediately by the Hoboken Police Department. I think that is sound advice and a very fair one regardless of whether someone might say this man is entitled to a fair trial.

Mr. Levin: In the event he is picked up by the Hoboken police bail can be arranged. It seems to me that there are facts in the public domain that will find their way into the press that are going to be connected with the defendant. I had three telephone calls today and I answered everything with "No comment."

The Court: All right. I think I have heard from everyone. Gentlemen, I am going to take a few minutes out.

(Recess.)

(64) (After recess, in open court without the presence of the jury.)

Mr. Singer: May I give you a newspaper which we have just received.

The Court: Hand it to me. I can read it.

Appendix F

The Marshal: The defendant is not present.

The Court: Be seated. Close the door.

Mr. Singer: I have read the article. And that raises the very situation I surmised.

The Court: You are speaking of the issue of sequestration. I have heard you on that.

Mr. Singer: That is the issue I am speaking on first.

The Court: Very well.

Mr. Singer: And I wonder if I might offer this front page of Friday, May 24, 1963 Newark Evening News, edition number 54521 in evidence on this subject.

The Court: For what purpose?

Mr. Singer: So it becomes a part of the record on this application, as part of this side bar discussion that we had.

The Court: You may if you wish. Of course, it is not evidence in the case. It would be for a purpose other than a finding of fact by the jury. It (65) would not come to the attention of the jury.

Mr. Singer: Certainly, only for the Court alone.

The Court: All right. It will be marked as an exhibit to preserve it, and the record will show that the Court has read the article.

The Clerk: Marked in evidence?

The Court: No, as an exhibit, that is all.

The Clerk: Marked D-2.

The Court: I have given further consideration to the Government's motion to sequester this jury and I have considered all of the circumstances in connection with that as it may relate to a trial, a fair trial in this case by the jury. I have reached the conclusion that the jurors should be sequestered. In fact, the jury has been at the order of the Court sequestered since our last recess. They have had lunch in the jury room. The jury will be sequestered for

the remainder of this trial and the trial will now continue on every weekday and holiday with the exception of Sunday until it is concluded. We will continue the trial tomorrow, and we will continue Monday, and if necessary, if it is not concluded, we will continue through Memorial Day and the following Saturday, and I now instruct the marshal to arrange for accommodations for the jurors to advise them of the (66) order of sequestration and to obtain from them a list of the things that they need and to bring those things from their homes to Newark. That is the order of the Court with respect to sequestration.

Now, in order to provide the marshal with an opportunity to obtain the list of personal things the jurors may need we will continue in recess and I will ask counsel to remain in the vicinity of the courtroom so that when the Court reconvenes later in the afternoon we will be ready to move.

Mr. Singer: Will your Honor permit me to make a motion now for a mistrial on the grounds that your Honor's action in sequestering the jury under these circumstances is so prejudicial as to deprive the defendant of all possibility of a fair trial, and I point out to your Honor that at this point we don't know whether the jurors ever heard of this particular incident before they arrived at the courthouse this morning. I have no knowledge when the incident occurred and I think that under these circumstances your Honor's sequestration of the jury would in essence be ascribing to this defendant some responsibility for this act which is the cause of the discussion, and I think it would be unfair and unjust under these circumstances to compel him to further continue on trial.

(67) The Court: Nothing of that nature was suggested, Mr. Singer, and I would say to you that you should refrain from reaching conclusions as to what may be in the Court's

mind except so far as the Court has announced it. I have not attributed this incident that appears in the newspaper to anyone. As a matter of fact, the motion to sequester has been pending since the opening day of this trial, and I reserved decision and since the opening day of the trial I have considered the issues involved, the other matters that both you and the U. S. Attorney brought to my attention with respect to publicity, and I have finally reached the conclusion independently of anything you have shown me in the newspaper today that the jury should be sequestered.

Now I have heard you with reference to your motion.

Mr. Singer: I am through with that.

* * *

The Court: I have considered your motion, heard you with respect to it and I deny your motion for a mistrial.

* * *

APPENDIX G

Excerpts from Original Transcript

(238) Newark. N. J.
May 27, 1963.

* * *

(239) The Court: I have decided with respect to the jury to relax some of the restrictions hertofore imposed, because I have reached a conclusion that all of them are not necessary. To a limited extent and under censorship the jurors will be permitted to see some television programs and to see some newspapers. The television programs will be monitored. The newspapers will be screened so that in connection with television programs or newspapers nothing will come to the jury which could possibly create any impression from an outside source with respect to the issues here, the testimony or any other developments. I want to bring that to the attention of counsel.

Also I might add generally a program has been developed which will afford the jurors the maximum convenience, both in the way of recreation when they are out of the court and in other respects appropriate consistent with the objective of insulating them from any information that would in any way be prejudicial either to the Government or the defendant in this case, and appropriate instructions have been issued to the marshal in connection with this.

Very well. I wanted to make that clear.

Mr. Singer: Before your Honor proceeds, may I respectfully urge that the written application I made (240) on Saturday morning with regard to interrogating each juror by your Honor in private, in the presense only of defense counsel, and not in the presence of each of the jury—any other juror—with regard to what they may have seen or heard or read concerning Mr. Provenzano since the begin-

ning of this trial, that your Honor conduct that inquiry, and I may say to your Honor that I would at this time—and that my application that I made to your Honor in that regard be made a part of the record of this trial, and also can be marked as part of the record.

May I also say this, that I have, in watching some television programs over the weekend, heard some things concerning Mr. Provenzano which right on their face were untrue, but in addition were so prejudicial—

I don't know who could censor a program in advance, because they don't replay it. There are news broadcasts that come on in the midst of these programs.

Newspapers with portions of them clipped out would indicate great public interest in this matter which is certainly a thing that we try to avoid, and I would think that the submission of newspapers to jurors with portions clipped out of it would be extremely prejudicial, and I say to your Honor again I want to renew, on the basis of what I have personally (241) read—and I'm certain the Court has read, seen and heard, since Friday morning concerning this unfortunate incident and the alleged arrest of somebody whom they said was Mr. Provenzano's brother-in-law, and that was a straight out-and-out distortion of fact—as a so-called material witness, and all of that is entirely—and some statements made by the Prosecutor's Office in Hudson County, alleged reports of F.B.I. agents, and the entry of the F.B.I. agents and the Attorney General into this matter, all of which have created an atmosphere in which it would be impossible for this defendant to receive a fair and impartial trial. In addition I say that since these instructions to the marshal, that your Honor speaks of, are not on the record, we ought for the defense be permitted to know what the instructions are to see, since the man's liberty is

involved, to see how well they are carried out, and I don't think anybody, no matter how you did it—no matter how they did it could possibly insulate these jurors from this situation, and I respectfully urge again that a motion for dismissal be granted for all of these reasons.

The Court: The motion is denied.

Are counsel ready to proceed?

(242) Mr. Boylan: Yes, your Honor.

Mr. Singer: May I ask you to rule on my application?

The Court: You made a motion for mistrial and I ruled. I denied the motion.

Mr. Singer: I also ask that the jurors be interrogated with regard to whether they have seen, heard or read anything about this defendant which they have not seen, heard or read in this courtroom since the trial began.

The Court: Mr. Singer, at the time the jury was chosen all questions relating to that and any impression that any juror might have had were thoroughly explored, and thereafter the particular incident that you emphasize so much was not publicized until after the jury had been sequestered, because, may I remind you, that on the morning when this incident occurred the jury was sequestered. The jurors were not permitted to leave for lunch and were cut off from every outside source of information, and at the close of the day the sequestration was continued in effect, and they have since been cut off from every source of outside information which could even remotely be related to this trial, and may I remind you, Mr. Singer, that when you opposed the (243) motion for sequestration you said then that if there was any possible information they could have had or would acquire you felt, as you stated on the record, that the Court could certainly take care of that by remedial instructions, so I would assume that you felt that was as of the time you

made your motion opposing sequestration, and it is a matter of extreme speculation, in view of the action the Court took, that during the early morning hours when I was not aware of any publicity, and I don't think anyone else was, that I know about, that they would have heard anything about this.

I do not propose to bring the jurors in and interrogate each one. Your motion to the Court for that is likewise denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 356

ANTHONY PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B)[1] is not yet reported. Opinions of the district court, ruling on petitioner's various motions, are not reported (Pet. App. C, D).

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[1] "Pet. App." refers to the various appendices to the petition for certiorari, "A.A." to the appellant's appendix and "G.A." to the government appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1967. The petition for a writ of certiorari was filed on July 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's second motion for a new trial based upon allegedly newly discovered evidence that one of the jurors at petitioner's trial was prejudiced.

STATEMENT

Petitioner seeks review of an order denying his second motion for a new trial based upon newly discovered evidence. He was convicted in the District of New Jersey of obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act). *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3), certiorari denied, 379 U.S. 947. On January 5, 1965, six days after the filing of the mandate reflecting affirmance of his conviction, petitioner moved for a new trial on the ground of newly discovered evidence that a juror, Stephen J. Cassidy, had failed to disclose his prejudice against petitioner on the voir dire examination of the jury panel. This motion was denied on March 30, 1965, after an extensive hearing, *United States* v. *Provenzano*, 240 F. Supp. 393 (D. N.J.), and the decision was affirmed by the Third Circuit on December 22, 1965, 353 F.2d 1011. Certiorari was denied on April 18, 1966. 384

U.S. 905. In that proceeding, the court, noting the intensive investigation which had been made of the jurors, directed that there be no further investigation without leave of court—a direction which was subsequently made a rule of the court (see A.A. 243-247).

1. In April, 1966, shortly after the denial of certiorari in the proceedings on the prior motion for new trial, petitioner, through new counsel, filed a motion for leave to interrogate juror Harry Hurwitz (A.A. 3-9). A hearing was held on this motion and two witnesses, William B. Bradley, president emeritus of the International Longshoremen's Association and a friend of petitioner, and Thomas Duffy, a former assistant of Bradley, testified concerning conversations with Hurwitz in 1965.[2] Hurwitz allegedly stated that there were transistor radios, television and newspapers at the hotel where the jury was quartered;[3] that the jury was disturbed by a fire which occurred at the hotel; that he had, in the course of his business as a salesman, received a check which later turned up as undisputed evidence in the trial; and that after the final vote a woman juror told him that petitioner had put her husband out of business by a ruling he had made as a labor mediator.

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[2] A third witness, Jack Sukosky testified, but his only testimony was that Hurwitz had not asked to be introduced to Duffy, as Bradley had testified.

[3] The jury had been sequestered during the trial in order to keep them from reading or hearing about the murder of Walter Glocker, a member of petitioner's union, because there were some allegations that petitioner had been responsible for Glocker's death.

When petitioner's counsel suggested that the court, of its own motion, examine the juror Hurwitz (A.A. 254), the court pointed out that the jurors had been interrogated at length on the voir dire and had deliberated a long time. He concluded that the court should not require the juror to testify without more convincing evidence of the genuineness of the alleged qualms revealed for the first time so long after verdict (A.A. 254-278).

In an oral opinion denying both the motion to examine the juror and the motion for a new trial, the court reviewed the substantial discrepancies in the testimony and stated that it had rarely encountered witnesses like Bradley and Duffy "whose contradictory statements under oath were so notable and whose demeanor in giving testimony was so unimpressive" (A.A. 315-324).

2. While an appeal was pending, petitioner moved for the issuance by the district court of a certificate that it was "inclined to grant a hearing heretofore requested." The motion was based on an affidavit of Harry Hurwitz addressed "To Whom it May Concern," dated June 30, 1966, which stated: (1) That affiant's territory was in the area of Michael Communale's office and that he had accepted a check payable to Communale which later became evidence at the trial of petitioner; (2) at least one juror knew of the shooting which took place during petitioner's trial; (3) this juror had also said that petitioner was responsible for putting her husband out of the trucking business; and (4) he and other jurors were concerned about the fire which occurred at the hotel

where they were quartered; and that all of these circumstances had prejudiced him in making up his mind as a juror (Pet. App. E).

The court conducted a hearing on this motion at which the judge, having issued subpoenas, did the questioning. (G.A. 108-109, 201). Emil Oxfeld, counsel to the American Civil Liberties Union, testified that in March 1966 Bradley had given him information obtained from Hurwitz which petitioner's then counsel had not wished to act upon. This information was to the effect that the jurors knew of the murder which occurred during petitioner's trial, that transistor radios and newspapers were in the jury room and that unmonitored television programs were seen by the jurors (G.A. 223-224, 230-233, 240).

Hurwitz was questioned by the court about the various points made in his affidavit. Concerning point (1), he stated that in the course of his business as a salesman he had received the check payable to Communale from one of his customers. Although there was no dispute about the check at trial and Hurwitz' name did not appear on it, he felt that in a way he was sort of prejudiced (G.A. 271-274). He did not recall that the court had questioned the jury panel as to their possible acquaintanceship with various persons, including Communale, whose occupation was identified and whose name was spelled out, or that he had failed to respond in any way (G.A. 296, 299-300). As to point (2), Hurwitz testified that word about the shooting came to him through juror Elizabeth Gautier, who said that she had received the information from a matron. Hurwitz remembered

that no juror had responded when defense counsel, in his summation, asked whether any juror had heard anything about the case from outside (G.A. 275-277). He admitted that the jury was under the strictest surveillance; that no matrons were allowed in the rooms at the same time as the jurors; that no transistor radios were in their quarters; that all television programs were monitored, and that nothing reached the jurors through the newspapers (G.A. 287, 288, 311). Hurwitz did not know who the murdered man was or any connection between that and the case, but felt that there was a tie-in (G.A. 320). Concerning point (3), after consulting his notes, Hurwitz testified that Mrs. Gautier had said after the trial that petitioner had forced her husband out of business (G.A. 322-324). As to point (4), Hurwitz testified that he did not associate petitioner with the fire at the hotel, but that the fire caused the jurors to be on edge (G.A. 288).

Hurwitz also testified that he had arrived at the opinion that petitioner was guilty early in the trial, before any of these matters had come to his attention (G.A. 310-312). He did not thereafter mention his prejudice to anybody, even to his wife, until he confided in Duffy, a man he knew as being vaguely connected with public relations. He believed that Duffy approached him on the subject (G.A. 270, 281-283, 307).[4] Duffy introduced him to Bradley, who told

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[4] It appeared from the testimony of petitioner's attorney Franzblau that Duffy was a licensed private investigator (G.A. 256).

him to communicate with the American Civil Liberties Union, which he did more than a year later (G.A. 267-270, 301-302). The June 30 affidavit, Hurwitz stated, was typed by himself upon a manual typewriter (G.A. 264-265, 291). Later, the Federal Bureau of Investigation, at the court's request, examined the letter and reported that it was not typed on a manual typewriter, but upon an IBM "Executive" electric typewriter (G.A. 359).

The court denied petitioner's motion, orally giving its reasons therefor (G.A. 335-357), and then subsequently supplementing them with a written opinion (Pet. App. D). The court reviewed the testimony of Hurwitz and the admitted lack of any connection between the matters mentioned in his affidavit and his own belief in petitioner's guilt, which preceded any of the occurrences mentioned. Hurwitz, the court stated, did not give the impression that he was "a person speaking with complete candor, and with sincerity out of any spirit of remorse for some wrongful act that he had done." The court also noted that in connection with a prior proceeding, the husband of juror Gautier had been interviewed by petitioner's investigator for over an hour and apparently nothing worthy of being called to the court's attention had resulted from that investigation. The court concluded that petitioner's motion should not be granted because no credible evidence of prejudicial conduct had been presented and because the alleged newly discovered evidence was known to exist at the time of the previous hearing and was either deliberately with-

held or was considered by prior counsel to be of so little consequence that it was not brought to the attention of the court (Pet. App. 24a-26a).

ARGUMENT

While petitioner criticizes the trial judge for not ordering juror Hurwitz to testify at the time of the first hearing on this motion, (Pet. 5) there can be no error in this regard since Hurwitz was subsequently called to testify.[5] Thus, the issue is reduced to two questions: (1) whether the testimony of Hurwitz showed such prejudice as would require the granting of a new trial or (2) whether the court should have permitted examination of the juror Gautier, or any other juror.

In view of the fact that Hurwitz admitted that he had come to the conclusion that petitioner was guilty before any of the allegedly prejudicial matters had come to his attention, it is difficult to see how petitioner could have been prejudiced, even if Hurwitz's testimony concerning these incidents is accepted. Moreover, the record reveals that there was ample reason for the court to question the veracity of Hurwitz and to refuse credit to his testimony. Since Hurwitz' testimony relates primarily to matters which allegedly came to the jury's attention after they had been sequestered, it is significant to note

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[5] In view of the substantial discrepancies in the testimony of Bradley and Duffy, outlined in the trial court's opinion (Pet. App. C), there was no error in the judge's original refusal to order Hurwitz to testify.

that, in its original review of petitioner's conviction, the Third Circuit found that "the precautionary measures taken by the court below were sufficient to render insubstantial any question concerning the possibility that the jurors read or heard any matter likely to be prejudicial to Provenzano before the end of the trial." See 334 F. 2d at 696.

The remaining question is whether the trial court abused its discretion in refusing to call in the juror Gautier or any or all of the remaining jurors for questioning. The reason for hesitancy in allowing a juror to impeach his own verdict was stated in *McDonald* v. *Pless*, 238 U.S. 264, 267-268, a civil case, in the following language:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—the destruction of all frankness and freedom of discussion and conference.

While in criminal cases the countervailing consideration of fully safeguarding the rights of the accused excludes the possibility of laying down any

general rule, *United States* v. *Reid*, 12 Howard 360, 366; *Mattox* v. *United States*, 146 U.S. 140, 147-149; *Remmer* v. *United States*, 347 U.S. 227, the courts have always been reluctant to intrude into this area, except for the most compelling reasons. See, *e.g.*, *Hyde* v. *United States*, 225 U.S. 347, 383-384; *Hendrix* v. *United States*, 219 U.S. 79; *Cunningham* v. *United States*, 356 F. 2d 454 (C.A. 5), certiorari denied, 384 U.S. 952; *Klimes* v. *United States*, 263 F. 2d 273 (C.A.D.C.); *Rees* v. *Payton*, 341 F.2d 859 (C.A. 4); *Brown* v. *United States*, 224 F.2d 845 (C.A. 6), certiorari denied, 350 U.S. 912; *United States* v. *Furlong*, 194 F.2d 1 (C.A. 7), certiorari denied, 343 U.S. 950; *Parsons* v. *United States*, 188 F.2d 878 (C.A. 5); *Medina* v. *United States*, 254 F.2d 228 (C.A. 9), certiorari denied, 358 U.S. 846.

The circumstances here patently did not require the recalling of Mrs. Gautier or the other members of the jury for questioning. Even on Hurwitz' testimony, she said nothing in her alleged conversation with him to connect the shooting with the case at hand. A full interview of her husband by petitioner's investigator, before the proceeding, apparently failed to disclose the supposed slight which allegedly prejudiced Mrs. Gautier. Thus, the evidence adduced was inadequate to justify recalling the jury. Cf. *United States* v. *Allied Stevedoring Corp.*, 258 F.2d 104 (C.A. 2), certiorari denied, 358 U.S. 841.

In view of the fact that petitioner's counsel was aware as early as March, 1966, when the original new trial motion was pending in the district court, of the allegation that the jury knew of the murder

but chose not to raise the issue, there was no abuse of discretion in the rulings of the trial court. *United States* v. *Johnson*, 327 U.S. 106; *Holt* v. *United States*, 218 U.S. 245, 250-251; *United States* v. *Hoffa*, 247 F. Supp. 692, 699-700 (E.D. Tenn.), affirmed May 2, 1967, C.A. 6, No. 16567.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1967

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